TOURO COLLEGE
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Touro Law Review

Volume 10 | Number 3 Article 22

1994

Due Process: Alfonso v. Fernandez

SECOND DEPARTMENT

Alfonso v. Fernandez[501]
(decided December 30, 1993)

The petitioners, parents of New York City public school students, commenced an action to prevent the implementation of a condom distribution program that was initiated as part of an overall Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) education program in New York City's public high schools.[502] The petitioners challenged the condom availability program on two independent constitutional grounds.[503] First, they alleged that the implementation of the program was a violation of the parent's substantive due process right to direct the upbringing of their children in accordance with their liberty interest found in both the State[504] and Federal[505] Constitutions.[506] Second, they alleged that the program violated the parent's right to the free exercise of religion, also protected by both the State[507] and Federal[508] Constitutions.[509] The court

501. 195 A.D.2d 46, 606 N.Y.S.2d 259 (2d Dep't 1993).

502. *Id.* at 49, 606 N.Y.S.2d at 261.

503. *Id.*

504. N.Y. CONST. art. I, § 6. The provision states in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

505. U.S. CONST. amend. XIV, § 1. The provision states in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

506. *Alfonso*, 195 A.D.2d at 49, 606 N.Y.S.2d at 261.

507. N.Y. CONST. art. I, § 3. The provision states in pertinent part: "The free exercise and enjoyment of religious profession and worship, without discrimination . . . shall forever be allowed in this state to all mankind . . . ." *Id.*

508. U.S. CONST. amend I. The provision states in pertinent part: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." *Id.*

509. *Alfonso*, 195 A.D.2d at 49, 606 N.Y.S.2d at 261. The parent petitioners also challenged the condom availability program as a violation of Public Health Law § 2504, claiming that the program "constitutes 'health services' to unemancipated minor children without the consent of their parents

failed to find an abridgment of the petitioners' rights to free exercise of their religion.[510] The court did, however, hold that the New York City School Board's plan to dispense condoms to unemancipated minor children, without parental consent or an opt out provision, violated the petitioners' civil rights under both the state and federal substantive due process clauses.[511]

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or guardians," and hence such a program would operate without legal authority. *Alfonso*, 195 A.D. 2d at 49, 606 N.Y.S.2d at 261. Public Health Law § 2504 provides:

1. Any person who is eighteen years of age or older, or is the parent of a child or has married, may give effective consent for medical, dental, health and hospital services for himself or herself, and the consent of no other person shall be necessary.
2. Any person who has been married or who has borne a child may give effective consent for medical, dental, health and hospital services for his or her child.
3. Any person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care.
4. Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk of the person's life or health.
5. Anyone who acts in good faith based on the representation by a person that he is eligible to consent pursuant to the terms of this section shall be deemed to have received effective consent.

N.Y. PUB. HEALTH LAW § 2504 (McKinney 1993). This provision codifies some of the exemptions to the common-law requirement of parental consent for "'medical, dental, *health* and hospital *services[s].*'" *Alfonso*, 195 A.D.2d at 51, 606 N.Y.S.2d at 262 (quoting N.Y. PUB. HEALTH LAW § 2504 (McKinney 1993)). Since none of the established exemptions are applicable to the petitioners' situation, the fact that the condom program was held to be a health service, combined with the fact that there was no parental consent, led the court to the conclusion that the program was operated without statutory authority. *Id.* at 48, 606 N.Y.S.2d at 261.

510. *Id.* at 59, 606 N.Y.S.2d at 267.

511. *Id.* at 60, 606 N.Y.S.2d at 268. As to the issue of whether or not the New York City School Board had the statutory authority to implement a condom distribution program without a parental consent requirement or an opt out provision, the court held that since the program constitutes a "health service" in accordance with Public Health Law § 2504 and since "[i]t is for the

The impetus behind the creation of the challenged condom distribution program dated back to September, 1987, at which time the New York State Commissioner of Education ordered that all elementary and secondary schools include instruction concerning HIV and the AIDS epidemic.[512] In late 1990, based on statistics that suggested that New York City teenagers accounted for 20% of the reported cases of adolescent AIDS in the United States, despite only making up approximately 3% of the teenagers in the nation,[513] the then Chancellor of the New York City Board of Education, Joseph Fernandez, recommended expanding the existing HIV/AIDS educational program to include instruction on the transmission and prevention of the virus.[514]

Congress or the Legislature, not the courts-and certainly not the State Commissioner of Education or a board of education-to provide the exceptions to parental consent requirements[,] . . . [t]here is no specific authority for [such a] program, no matter how commendable its purpose may be." *Id.* at 54-55, 606 N.Y.S.2d at 264.

512. *Id.* at 48, 606 N.Y.S.2d at 261 (referring to N.Y. COMP. CODES R. & REGS. tit. 22, § 135.3(b)(2),(c)(2)) (1992).

513. 195 A.D.2d at 50, 606 N.Y.S.2d at 261. The statistics that the court cited were provided by Dr. Margaret Hamberg, the Acting Commissioner of the New York City Department of Health. *Id.* at 61, 606 N.Y.S.2d at 268 (Eiber, J., dissenting). Doctor Hamberg also pointed out that "29% of all AIDS cases in the United States are diagnosed in young adults between the ages of 20 to 29 [and s]ince the disease has an 8 to 10-year latency period . . . 'this statistic suggests that the majority of those persons must have been infected as adolescents.'" *Id.* (Eiber, J., dissenting). The court, acknowledging these statistics, pointed out that the supporters of the condom distribution program feel that the program is "a legitimate and necessary part of public school health education directed at control of a public health crisis." *Id.* at 50, 606 N.Y.S.2d at 261. However, the court also acknowledged the concerns of opponents to the plan who fear that:

> [T]he condom availability component of the plan is tantamount to condoning promiscuity and sexual permissiveness, and that the exposure to condoms and their ready availability may encourage sexual relations among adolescents at an earlier age and/or with more frequency, thereby weakening their moral and religious values. [Opponents to the plan] doubt the wisdom or the desirability of a public school system engaging in what they view as a controversial social program peripheral to the immediate task of educating children.

Id. at 50, 606 N.Y.S.2d at 262.

514. *Id.* at 48-49, 606 N.Y.S.2d at 261.

Pursuant to the Chancellor's suggestion, the New York City Board of Education voted to establish a two part expanded HIV/AIDS Education Program in New York City's public high schools.[515] The first portion of the expanded program involved classroom instruction that was designed to expose students to the methods of both transmitting and preventing HIV.[516] This portion of the program had "a parental opt-out provision," but was mandatory for those students whose parents did not elect to use that opt-out provision since they were required to participate in the curriculum.[517] The second portion of the expanded program involved making condoms available to students who requested them.[518] This portion of the program envisioned each public high school having health resource rooms where students who requested condoms would receive personal health guidance counseling from trained professionals regarding the proper use and the consequences of improper use of a condom.[519] Because participation in this portion of the program was not required, no penalties would be levied against students who did not utilize the health resource rooms.[520] However, as the court noted, this condom availability portion of the program had no parental consent requirement nor any opt out provision.[521] It is this

515. *Id.* at 49, 606 N.Y.S.2d at 261.

516. *Id.*

517. *Id.* The opt-out provision allowed parents the opportunity to keep their children out of the classroom instruction provided that the parents gave the school assurances that the child would receive such instruction at home. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.* The dissenting opinion pointed out that after considering the possibility of including a parental opt-out provision in the condom availability portion of the program, the Board decided against inclusion of such a provision since it "would be unwise because students whose parents disapprove of premarital sexual relations may especially 'be in need of a place where they can obtain condoms without having to account for any expenditures of funds or having to identify themselves in order to get the condoms.'" *Id.* at 61-62, 606 N.Y.S.2d at 269 (Eiber, J., dissenting). For these reasons, the Board feared that a parental opt-out provision "'would so seriously limit participation in the program as to make it ineffective in reaching many of those students who most need it.'" *Id.* at 62, 606 N.Y.S.2d at 269 (Eiber, J., dissenting).

portion of the New York City Board of Education's expanded HIV/AIDS Education Program that the parent petitioners sought to prohibit by challenging its constitutionality.[522]

Due process accords parents a constitutionally protected liberty interest in raising their children as they see fit.[523] Once an intrusion on this fundamental right has been demonstrated by the petitioner the burden shifts to the state to prove that a compelling state interest is involved and that the statute or program, in question, is drawn narrowly enough such that the means are

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522. *Id.* at 49, 606 N.Y.S.2d at 261.

523. *Id.* at 56, 606 N.Y.S.2d at 265. *See* U.S. CONST., amend. XIV; N.Y. CONST. art. I, § 6; *see also* Roe v. Wade, 410 U.S. 113 (1973). The *Roe* Court recognized that, although not expressly stated in the Constitution, a "right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* at 152. The Court considered this privacy right could "be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," and in holding it applicable to a woman's decision whether or not to terminate her pregnancy, reiterated it's application to the fundamental right of parental control over child rearing and education. *Id.* at 152-53; Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (affirming the fundamental right of parents and guardians to direct the upbringing and education of children under their control in holding Oregon's Compulsory Education Act not reasonably related to a purpose within the competency of the State). The Act required "every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides." *Id.* at 530; Meyers v. Nebraska, 262 U.S. 390 (1923), where the Court upheld the liberty right guaranteed by the Due Process Clause of the Fourteenth Amendment that empowers parents to control the education and upbringing of their children, when it construed a Nebraska statute, making it a misdemeanor for any person to "teach any subject to any person [who has not yet completed the eighth grade] in any language other than the English language," to be "arbitrary and without reasonable relation to any end within the competency of the State." *Id.* at 397, 403. In reversing the conviction of a parochial school instructor who, in German, taught the subject of reading to a pupil who had not yet completed the eighth grade, the Court held that both "[h]is right . . . to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [Fourteenth] Amendment." *Id.* at 400.

necessary in achievement of the compelling interest.[524] The *Alfonso* court found that "the petitioners enjoy [this] well-recognized liberty interest in rearing and educating their children in accord with their own views."[525] Specifically, this parenting right protects the petitioners' ability to "influence and guide the sexual activity of their children without State interference."[526] Given this fact, the court applied the compelling state interest test,[527] and found that there is no question that "'the State has a compelling interest in controlling AIDS . . . [and] in educating its youth about AIDS.'"[528] Therefore, the next determination to be made was whether the state interference with petitioner's fundamental right to raise a child free of interference was necessary to achieve the desired end, that is, control of the AIDS epidemic.[529] Specifically, the *Alfonso* court inquired whether it can be said that "absent the [condom availability] program challenged by the petitioners, sexually active students, educated by the schools to the danger of sexually transmitted diseases, will

524. *Alfonso*, 195 A.D.2d at 56, 606 N.Y.S.2d at 265; *see also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (holding that an "interest of sufficient magnitude" must be put forth when the State "impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children"); *In re* Marie B., 62 N.Y.2d 352, 358, 465 N.E.2d 807, 810, 477 N.Y.S.2d 87, 90 (1984) (reaffirming that "[f]undamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity").

525. *Alfonso*, 195 A.D.2d at 56, 606 N.Y.S.2d at 265 (citing U.S. CONST. amend. XIV and N.Y. CONST. art. I, § 6).

526. *Id.* at 56, 606 N.Y.S.2d at 266.

527. *Id.* at 58, 606 N.Y.S.2d at 266-67.

528. *Id.* at 53, 606 N.Y.S.2d at 263 (quoting Ware v. Valley Stream High Sch. Dist., 75 N.Y.2d 114, 128, 550 N.E.2d 420, 429, 551 N.Y.S.2d 167, 176 (1989)). The *Alfonso* court stated that not only does the state have a compelling interest in controlling AIDS but since "'[e]ducation regarding the means by which AIDS is communicated is a powerful weapon against the spread of the disease and clearly an essential component of our nationwide struggle to combat it[,]'" the state also has a compelling interest in educating it's youth about the epidemic. *Id.*

529. *Id.* at 58, 606 N.Y.S.2d at 266-67.

be unable to acquire condoms without difficulty?"[530] Since, as the court noted, there existed several alternative means by which minors could obtain condoms, "[t]he answer [to this inquiry] must clearly be no."[531] Hence, since the condom availability component of the School Board's program was not so narrowly tailored such that it could be deemed necessary to the achievement of the recognized compelling state interest, the majority held that the challenged program "violate[d] the petitioners' constitutional due process rights to direct the upbringing of their children."[532]

The dissent in *Alfonso* presented a strong counter-argument to the majority's due process analysis.[533] The dissent attempted to

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530. *Id.* at 58, 606 N.Y.S.2d at 267.

531. *Id.* The court cited as an alternative source of condom availability for minors, "publicly funded nonschool programs where condoms are available to minors as part of confidential family planning, as provided under the Social Security Act and Public Health Service Act." *Id.* Likewise, given the decision in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), where the U.S Supreme Court held that a state has no significant interest sufficient to enact a "blanket prohibition on the distribution of contraceptives to minors," *id.* at 693-94, the *Alfonso* court acknowledged the relative ease with which a minor may obtain condoms at a local drug store or convenience store. 195 A.D.2d at 58, 606 N.Y.S.2d at 267. Finally, the court states that the School Board's condom availability program could coexist without contravening due process guarantees by simply "allowing parents who are interested in providing appropriate guidance and discipline to their children to 'opt out' by instructing the school not to distribute to their children without their consent." *Id.*

532. *Id.* at 59, 606 N.Y.S.2d at 267.

533. *Id.* at 65-71, 606 N.Y.S.2d at 271-75 (Eiber, J., dissenting). The dissent also criticized the majority for deeming the condom program a health service subject to Public Health Law § 2504. *Id.* at 63-64, 606 N.Y.S.2d at 270 (Eiber, J., dissenting). As the dissent reasoned, "if the distribution of condoms is a 'health service' which cannot be undertaken without parental consent, then the many family planning clinics throughout this state which distribute condoms and other contraceptive devices to minors must also be deemed in violation of the common law and statute." *Id.* at 65, 606 N.Y.S.2d at 271 (Eiber, J., dissenting). Further, the dissent argued that to impose a parental consent requirement on the condom availability program would run afoul of the United States Supreme Court's holding in *Carey*. *Id.* at 64, 606 N.Y.S.2d at 270 (Eiber, J., dissenting). *See Carey*, 431 U.S. at 693-94 (holding that since "the right to privacy in connection with decisions affecting

undermine the majority's reliance on federal precedent by distinguishing the school board's condom availability program from the situations in *Meyer v. Nebraska*[534] and *Pierce v. Society of Sisters*.[535] According to the dissent, the element of "compulsion" that supported the *Meyer* and *Pierce* decisions was absent in the present case.[536]

The petitioners in *Alfonso* also raised a challenge to the condom availability program pursuant to their right to free exercise of their religious beliefs.[537] The Free Exercise Clause[538] protects against impermissible government regulation of religious beliefs.[539] The threshold question to be asked in a

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procreation extends to minors as well as adults[,]" the state may not impose "a blanket prohibition of the distribution of contraceptives to minors").

534. 262 U.S. 390 (1923).

535. 268 U.S. 510 (1925).

536. *Alfonso*, 195 A.D.2d at 67, 606 N.Y.S.2d at 272. The dissent pointed out that "the mere fact that parents are required to send their children to school does not vest the condom distribution program with the aura of 'compulsion' necessary to make out a viable claim of deprivation of a fundamental constitutional right." *Id.* "Unlike *Meyer*, where a state attempted to totally prohibit parents from permitting their children to study a foreign language until after completion of the eighth grade, or *Pierce*, where a state attempted to prohibit parents from sending their children to private parochial schools," the *Alfonso* dissent claimed that "the element of compulsion is totally absent here . . . [since t]he petitioners are free to impart their religious and moral values to their children in the privacy of their own homes, and to instruct their children not to participate in the condom distribution program." *Id.*; *see also* Doe v. Irwin, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980). In *Doe*, the parents of a 16 year old girl, who received contraceptives from a publicly operated family planning clinic which did not require parental notification, challenged the distribution of such products as a violation of their constitutionally-protected right of parental control. *Id.* at 1163. In distinguishing the parent's reliance on *Meyer* and it's progeny, the majority pointed out that the state, through the clinic, "merely established a voluntary birth control clinic . . . [with] no requirement that the children of the plaintiffs avail themselves of the services offered by the [clinic] and no prohibition against the plaintiffs' participating in decisions of their minor children on issues of sexual activity and birth control." *Id.* at 1168.

537. 195 A.D.2d at 49, 606 N.Y.S.2d at 261.

538. U.S. CONST amend. I; N.Y. CONST art. I, § 3.

539. *See, e.g.*, Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 709 (1981) (holding that the state's denial of unemployment

free exercise claim is whether the government regulation places any burden upon the claimant's free exercise rights.[540] Specifically, the primary focus "'in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices.'"[541] In addressing the threshold question, the *Alfonso* court determined that no constitutionally-prohibited

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benefits to the petitioner, a Jehovah's Witness who terminated his job in a machinery fabrication plant because his religious beliefs forbade participation in the production of turrets for military tanks, constituted a violation of his First Amendment right to free exercise of religion); Sherbert v. Verner, 374 U.S. 398, 399-402 (1963) (holding that South Carolina violated the petitioner's right to free exercise of religion when it disqualified her from unemployment benefits because she refused to take a job that required her to work on Saturday, the Sabbath Day of her church, the Seventh-day Adventist Church); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding that since the First Amendment prohibits compelled affirmation of those religious beliefs which are repugnant, the state could not deny a public office to a person solely because of the person's refusal to profess a belief in God). *But see* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that the free exercise clause did not prohibit the State of Oregon from applying its drug laws to the use of peyote in religious ceremonies).

540. *See Sherbert*, 398 U.S. at 403; *see also* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987) (stating that "[t]he first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment").

541. *See Alfonso*, 195 A.D.2d at 59, 606 N.Y.S.2d at 267 (quoting Rector, Wardens and Members of the Vestrey of St. Bartholomew's Church v. City of N.Y., 914 F.2d 348, 355 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). In *St. Bartholomew's Church*, the petitioner challenged New York City's Landmarks Law, which prohibited the Church from demolishing one of its buildings designated as a landmark without the approval of the Landmarks Preservation Commission, as facially violative of its free exercise of religion right in that it "impaired the Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission." *Id.* at 353. The Second Circuit Court of Appeals held that the Landmarks Law presented no burden of constitutional proportion on the petitioner "absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." *Id.* at 355.

burden was placed on the parent petitioners by the school board's condom program.[542] The condom availability program was found to exert neither compulsion[543] nor coercion[544] upon petitioners or their children[545] because there were no sanctions nor criminal liability for failure or refusal to participate.[546] Further, the petitioner's mere objection to the condom programs contrary to their religious beliefs did not rise to the level of a constitutional burden inconsistent with the free exercise clause.[547]

Hence, while the condom availability portion of the School Board's HIV/AIDS educational program did not run afoul of the petitioner's state and federal free exercise rights, the program did, in light of the *Alfonso* majority's interpretation of state and

542. 195 A.D.2d at 59, 606 N.Y.S.2d at 267.

543. *Id.* at 60, 606 N.Y.S.2d at 268. *See, e.g., Mozert*, 827 F.2d at 1065. The *Mozert* court held that the school board's inclusion of material in elementary school reading courses that petitioner, a born again Christian, found objectionable was not violative of her free exercise right. *Id.* The court reasoned that because, unlike *Sherbert* and *Thomas*, the element of compulsion was not present, hence absent a showing that requisite course "participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice," no unconstitutional burden was placed on petitioner. *Id.*

544. *Alfonso*, 195 A.D.2d at 60, 606 N.Y.S.2d at 268. *See, e.g., Sherbert*, 374 U.S. at 404. The *Sherbert* court found that the state's denial of unemployment benefits to petitioner based on her religious conviction against working on Saturdays was unconstitutionally coercive since such denial of benefits "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.*

545. *Alfonso*, 195 A.D.2d at 60, 606 N.Y.S.2d at 268.

546. *Id.* at 59, 606 N.Y.S.2d at 267. The court reasoned that "[t]he petitioners' contention that the students are 'bombarded' with information respecting the program, and that they may be tempted to succumb to peer pressure, do not rise to the level of a constitutional violation." *Id.*

547. *Id.*; *see also* Smith v. North Babylon Union Free Sch. Dist., 844 F.2d 90, 93 (2d Cir. 1988) ("In a pluralistic society such as ours it is impossible for government to accommodate every need of every religious group."); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1542 (9th Cir.) (holding that if "the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible"), *cert. denied*, 474 U.S. 826 (1985).

federal substantive due process protection, abridge petitioner's fundamental right to rear and educate their children as they saw fit.[548] Based on this holding, the School Board was "prohibited from dispensing condoms to unemancipated, minor students without the prior consent of their parents or guardians, or without an opt-out provision."[549]

Manshul Construction Corp. v. New York City School Construction Authority[550]
(decided April 19, 1993)

Plaintiff asserted that his rights to due process and equal protection were violated under the New York State[551] and Federal[552] Constitutions when he was denied the opportunity to bid on construction contracts based on his failure to meet established prequalification requirements. The court held that neither the plaintiff's rights to due process nor equal protection were violated.[553]

In this case, the plaintiff brought an article 78 proceeding to review the determination by the defendant that the plaintiff did not satisfy the prequalification requirements necessary to bid on contracts.[554] This proceeding was an appeal by the plaintiff from a prior federal action litigated between the same parties which granted the defendant's motion to dismiss the plaintiff's causes of action.[555]

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548. *Alfonso*, 195 A.D.2d at 60, 606 N.Y.S.2d at 268.

549. *Id.*

550. 192 A.D.2d 659, 596 N.Y.S.2d 475 (2d Dep't 1993).

551. N.Y. CONST. art. I, §§ 6, 11. Section 6 provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law." *Id.* Section 11 provides in relevant part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

552. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

553. *Manshul*, 192 A.D.2d at 659-60, 596 N.Y.S.2d at 476.

554. *Id.* at 659, 596 N.Y.S.2d at 476.

555. *Id.*

In the case at hand, the appellate division referred to the federal district court's decision, which held that the plaintiff's due process rights were not violated, and stated that the plaintiff was therefore collaterally estopped from relitigating his claims of due process violations.[556] In referring to the federal district court's analysis of plaintiff's due process claims, the appellate division explained that the district court applied New York State law and cited *Economico v. Village of Pelham*.[557] In *Economico*, the New York Court of Appeals stated that in order to determine whether an individual has a liberty or property interest, it is necessary to examine the applicable state law.[558] The court applied the relevant state law and held that the failure to afford plaintiff a hearing was not a violation of due process.[559]

More recently, in *Dentom Transportation, Inc. v. New York City Human Resources Administration*,[560] the state supreme court applied relevant state law in examining plaintiff's claims of due process violations.[561] The court reasoned that the defendant was not required to provide a hearing to the plaintiff and held that the plaintiff's due process rights were not violated.[562] The court further held that the defendant was not obligated to give the busing contract to the plaintiff.[563] Similarly, in *Conduit and*

556. *Id.*

557. 50 N.Y.2d 120, 405 N.E.2d 694, 428 N.Y.S.2d 213 (1980). In *Economico*, the plaintiff was a tenured employee who was absent from his work for eighteen months due to injuries he sustained in a non work-related accident. *Id.* at 124, 405 N.E.2d at 695, 428 N.Y.S.2d at 214. Due to the plaintiff's absence, the defendant's board of trustees terminated his employment. *Id.* As a result, the plaintiff filed an article 78 proceeding against the defendant claiming that he suffered due process violations because he was not given a hearing prior to his dismissal. *Id.* at 124, 405 N.E.2d at 696, 428 N.Y.S.2d at 215.

558. *Id.* at 125, 405 N.E.2d at 696, 428 N.Y.S.2d at 215.

559. *Id.* at 128, 405 N.E.2d at 698, 428 N.Y.S.2d at 217.

560. 155 Misc. 2d 31, 588 N.Y.S.2d 713 (1992).

561. *Id.* at 37, 588 N.Y.S.2d at 717. The plaintiff, as a result of having its bid previously rejected by the City Comptroller, brought an article 78 proceeding to require the city to award the plaintiff a busing contract. *Id.* at 32-33, 588 N.Y.S.2d at 714.

562. *Id.* at 37, 588 N.Y.S.2d at 717.

563. *Id.*

Foundation Corp. v. Metropolitan Transportation Authority,[564] the court applied the relevant state corporate law and determined that, based upon good reason, any contract bid could be rejected.[565] The court further stated that "[n]either the low bidder nor any other bidder has a vested property interest in a public works contract . . . ."[566] Accordingly, the court held that the plaintiff's due process rights were not violated.[567]

Federal case law is in agreement with New York State case law in that state law should be applied when determining whether procedural due process rights have been violated because a liberty or property interest existed. In *Board of Regents of State Colleges v. Roth*,[568] the Supreme Court explained that the Constitution does not create property interests.[569] Instead, the Court stated, such interests are defined by state law or existing rules.[570] The Court applied state law, which left to the discretion of the University whether or not to rehire a teacher.[571] Based on the above, the Court held there was no due process violation

564. 66 N.Y.2d 144, 485 N.E.2d at 1005, 495 N.Y.S.2d 340 (1985).

565. *Id.* at 148, 485 N.E.2d at 1008, 495 N.Y.S.2d at 343.

566. *Id.* at 148-49, 485 N.E.2d at 1008, 495 N.Y.S.2d at 343. The court of appeals noted further:

> Although the power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process, the discretionary decision ought not to be disturbed by the courts unless irrational, dishonest or otherwise unlawful.

Id.

567. *Id.* at 150, 485 N.E.2d at 1009, 495 N.Y.S.2d at 344.

568. 408 U.S. 564 (1972). The plaintiff was hired as an assistant professor at Wisconsin State University for one year and after his term expired he was not rehired. *Id.* at 566. The plaintiff was given no reason why he was not rehired nor was he given a hearing in order to challenge the decision. *Id.* at 568. The plaintiff claimed his procedural due process rights were violated because he was denied a hearing. *Id.* at 569. However, the Court disagreed with plaintiff's assertions and stated that he did not have a property or liberty interest which would warrant a hearing. *Id.* at 579.

569. *Id.* at 577.

570. *Id.*

571. *Id.* at 566-67.

because plaintiff had failed to "show[] that he was deprived of liberty or property protected by the Fourteenth Amendment."[572]

The Second Circuit Court of Appeals, in *White Plains Towing Corp. v. Patterson*,[573] followed the reasoning of *Roth* by applying state law in examining whether a liberty or property interest existed in claims of due process violations.[574] In *White Plains Towing Corp.*, the court had to determine whether there had been a violation of due process where State Police terminated a towing company's contract which provided towing services for Interstate Route 287 in Westchester County.[575] To this end, the Second Circuit applied the reasoning set forth in *Roth*, and stated that in determining whether the plaintiff had a property right in the continued employment, "a plaintiff 'must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'"[576] Thus, the court found that under New York State law, the informal relationship which existed between the parties did not create a "property right[] protected by due process."[577] Additionally, the court held that "plaintiffs had

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572. *Id.* at 579.

573. 991 F.2d 1049 (2d Cir.), *cert. denied*, 114 S. Ct. 185 (1993).

574. *Id.* at 1062. "Under New York law, a contract for services that makes no specific provision for duration is presumed to be terminable at will." *Id.*

575. *Id.* at 1052-53. The court stated that "[a]n interest that state law permits to be terminated at the whim of another person is not a property right that is protected by the Due Process Clause." *Id* at 1062.

576. *Id.* (quoting *Roth*, 408 U.S. at 577).

577. *Id.* The court stated:

> The parties stipulated that the . . . system for assigning segments of I-287 to towing operators was 'not specifically authorized by, or codified in any statute or in any regulation of the State Police,' that these assignments were 'not contractual in nature' that the assignments were 'not specifically licensed or issued permits by the State Police to operate or to provide services under the . . . dispatch system.'

Id.; *see also* S & D Maintenance Co. v. Goldin, 844 F.2d 962, 969-70 (2d Cir. 1988). The court stated:

> In the absence of a contractual or state law entitlement to prompt payment, we need not consider whether a prompt payment right, if otherwise established, could be interfered with, without some form of

no cognizable property interest in continued towing referrals . . . and the mere termination of their status . . . did not deprive them of a due process-protected interest."[578]

The plaintiff in *Manshul* also asserted an equal protection claim[579] alleging that he was not allowed to bid on contracts for the defendant.[580] However, the appellate division dismissed plaintiff's claim and explained that the plaintiff was trying to relitigate the same issue which had already been decided in federal district court, thus the plaintiff was collaterally estopped from relitigating this claim.[581] The court further stated that in order for equal protection to apply under either state or federal law, there must be state action.[582]

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due process protection, by the State's power to defer payment pending an investigation to determine legality.

Id.

578. *White Plains Towing Corp.*, 991 F.2d at 1062.

579. N.Y. CONST. art. I, § 11. The court stated that it has "held that the Equal Protection Clause in the New York State Constitution . . . is no broader in coverage than its Federal counterpart, and this equation with the Federal provision extends to the requirement of 'State action' in order for the Equal Protection Clause to be applicable. *Id.* (citations omitted).

580. *Manshul*, 192 A.D.2d at 660, 496 N.Y.S.2d at 476.

581. *Id.*

582. *Id.*; *see also* Under 21 v. City of New York, 65 N.Y.2d 344, 60, n.6, 482 N.E.2d 1, 7, n.6, 492 N.Y.S.2d 522, 528, n.6 (1985) (stating that the Equal Protection Clause under the State and Federal Constitutions are the same in coverage and both require state action in order for the Clause to be applicable); Esler v. Walters, 56 N.Y.2d 306, 313-14, 437 N.E.2d 1090, 1094 452 N.Y.S.2d 333, 337 (1982) (stating that the Equal Protection Clause under the State Constitution is not broader than its federal counterpart); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530, 87 N.E.2d 541, 548 (1949), *cert. denied*, 399 U.S. 981 (1950) (stating that it is necessary to determine whether the Equal Protection Clause under the New York State Constitution is broader than the Equal Protection Clause under the Fourteenth Amendment of the Federal Constitution); McDermott v. Forsythe, 188 A.D.2d 173, 177, 594 N.Y.S.2d 436, 439 (3d Dep't 1993) (holding that the establishment of different dates for reclassification of new civil service titles was not a violation of equal protection); Shattenkirk v. Finnerty, 97 A.D.2d 51, 55, 471 N.Y.S.2d 149, 153 (3d Dep't 1983), *aff'd in part, rev'd in part*, 62 N.Y.2d 949, 468 N.E.2d 53, 479 N.Y.S.2d 215 (1984) (stating that the Equal Protection Clauses under the State Constitution and its federal counterpart were equal).

The federal courts have also interpreted the Federal and State Equal Protection Clauses to grant many of the same rights. In *Burka v. New York City Transit Authority*,[583] the plaintiffs who were drug abusers alleged that they suffered equal protection violations under both the Federal and the New York State Constitutions.[584] They "claim[ed] that they "[were] not afforded the same protection as other *disabled* employees, such as alcohol users . . . ."[585] Specifically, "[t]hey contend[ed] that they [were] treated differently than others (alcohol users) similarly situated within the class, and that such disparate treatment bears no rational relationship to the [defendant's] stated objectives."[586] The court dismissed the plaintiff's federal claim stating that there existed a rational relationship between the Transit Authority's drug screening program and "its policy . . . designed to help ensure a safe and dependable public transit system."[587] As to the plaintiff's state equal protection claim, the court noted that "the equal protection clauses of the United States and New York constitutions are coextensive[,]"[588] thus mandating the dismissal of this claim.[589]

Thus, as to both the due process and equal protection claims asserted in *Manshul*, both the state and federal courts appear to be in agreement as to their handling of the issues presented.

T.E.A. Marine Automotive Corp. v. Scaduto[590]
(decided December 27, 1993)

Appellant claimed that publication of a tax lien sale violated his right to due process as provided in the State[591] and Federal[592]

583. 680 F. Supp 590 (S.D.N.Y. 1988).

584. *Id.* at 601-02.

585. *Id.* at 601-03.

586. *Id.* at 602. The "policies in issue [in this case] prohibit[ed] drug use, requir[ed] drug testing, and disciplin[ed] or refus[ed] to hire those who test[ed] positive [for drug use] . . . ." *Id.* at 603.

587. *Id.* at 602-03.

588. *Id.*

589. *Id.*

590. ___ A.D.2d ___, 607 N.Y.S.2d 47 (2d Dep't 1993).

Constitutions.[593] This action was brought pursuant to an article 78 proceeding[594] to vacate a tax deed assessed against the appellant.[595] The appellate division held that written notice was not violative of the Due Process Clause of both the State and Federal Constitutions.[596]

In *McCann v. Scaduto*,[597] the New York Court of Appeals held that "where the interest of a property owner will be substantially affected by an act of government, and where the owner's name and address are known, due process requires that actual notice be given."[598] Furthermore, the court of appeals concluded that a "tax lien sale . . . creates 'momentous consequences' for the homeowner and that — balanced against these consequences — requiring that a notice be mailed to a person whose name and address are known imposes a minimal burden on the County. Actual notice is therefore required."[599] Thus, noting that appellant's title to the subject property was valid, the court reasoned that due process was "not offended by the fact that the municipal[ity] . . . mailed written notice of the tax lien sale to the same address as that to which the Receiver of Taxes of the Town of North Hempstead had consistently been sending the actual tax bills."[600]

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591. N.Y. CONST. art. I, § 6 provides that "[n]o person shall be deprived of life, liberty or property without due process of law."

592. U.S. CONST. amend. V states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV § 1 similarly provides that "[n]o state shall . . . deprive to any person of life, liberty, or property without due process of law . . . ."

593. *T.E.A.*, ___ A.D.2d at ___, 607 N.Y.S.2d at 47.

594. N.Y. CIV. PRAC. L. & R. 7801-06 (McKinney 1981 and Supp. 1994).

595. *T.E.A.*, ___ A.D.2d at ___, 607 N.Y.S.2d at 47

596. *Id.* at ___, 607 N.Y.S.2d at 48.

597. 71 N.Y.2d 164, 519 N.E.2d 309, 524 N.Y.S.2d 398 (1987).

598. *Id.* at 176, 519 N.E.2d at 314, 524 N.Y.S.2d at 403.

599. *Id.* at 177, 519 N.E.2d at 314-15, 524 N.Y.S.2d at 404 (citation omitted).

600. *Id.* at ___, 607 N.Y.S.2d at 48.

Moreover, in *ISCA Enterprises v. City of New York*,[601] the court of appeals held that a municipality satisfied the minimum requirements of due process when it mailed notices of a tax lien sale to the names and addresses contained in a tax assessment record.[602] Additionally, in *Anthony v. Town of Brookhaven*,[603] the appellate division ruled that a municipalities' "use of its current assessment roll as the source of the names and addresses of property owners was appropriate under the circumstances . . . . [T]he assessment roll constitute[d] a comprehensive and generally accurate compilation of property ownership . . . ."[604]

The federal judiciary has dealt with the requirement of proper notice. For example, in *Mullane v. Central Hanover Bank & Trust*[605] the United States Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[606] This standard for notice was applied to a tax lien proceeding in *Mennonite Board of Missions v. Adams*.[607] In *Mennonite*, the Court ruled that "[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be

601. 77 N.Y.2d 688, 572 N.E.2d 610, 569 N.Y.S.2d 927 (1991), *cert. denied*, 112 S. Ct. 1263 (1992).

602. *Id.* at 701-02, 572 N.E.2d at 616-17, 569 N.Y.S.2d at 933-34.

603. 190 A.D.2d 21, 596 N.Y.S.2d 459 (2d Dep't 1993).

604. *Id.* at 28, 596 N.Y.S.2d at 463. The case involved the rezoning of real property, where notice was given by publication and mail. *Id.* at 22, 596 N.Y.S.2d at 459.

605. 339 U.S. 306 (1950).

606. *Id.* at 314. In *Mullane*, the mere publication of judicial settlements was deemed an inadequate form of notice because the names and addresses of the beneficiaries entitled to such settlements were known, and providing personal notice by mail would not have created an undue hardship. *Id.* at 318.

607. 462 U.S. 791 (1983).

supplemented by notice mailed to the mortgagee's last known available address, or by personal service."[608]

Most recently, in *Weigner v. City of New York*,[609] the Second Circuit Court of Appeals used the *Mullane* standard in a foreclosure proceedings.[610] In *Weigner*, appellant owned real property and failed to pay taxes for more than four years.[611] By receiving bills and letters from the City relating to her delinquency, appellant knew foreclosure was pending.[612] The court held that "notice by ordinary mail supplemented by publication and posting was reasonably calculated to inform the parties affected. Due process does not require that notice sent by first class mail be proven to have been received."[613]

In conclusion, New York and federal case law are in accord on what type of notice is required for a tax lien proceeding to satisfy due process. Both require actual notice be mailed when the names and addresses of the parties are known to the municipality.

Unification Theological Seminary v. City of Poughkeepsie[614]
(decided February 7, 1994)

The plaintiffs claimed that the single family zoning ordinance of the City of Poughkeepsie[615] was unconstitutional because it

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608. *Id.* at 798 ("Until 1980 . . . Indiana law did not provide for notice by mail or personal service to mortgagees of property that was to be sold for nonpayment of taxes.").

609. 852 F.2d 646 (2d Cir. 1988).

610. *Id.* at 651.

611. *Id.*

612. *Id.*

613. *Id.*

614. ___ A.D.2d ___, 607 N.Y.S.2d 383 (2d Dep't 1994).

615. POUGHKEEPSIE, N.Y. CODE § 19-2.2 (1990). Definition of a Family:

(a) One (1), two (2) or three (3) persons occupying a dwelling unit; or

(b) Four (4) or more persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family.

(2) It shall be presumptive evidence that four (4) or more persons living in a single dwelling unit who are not related by blood,

violated the due process clause of the New York State Constitution.[616] At issue was the ordinance's rebuttable presumption that a household of more than three unrelated persons is not functionally equivalent to a traditional family.[617] The supreme court held the zoning ordinance constitutional and the appellate division affirmed. The decision rested on two propositions: First, that zoning ordinances carry a presumption of constitutionality;[618] and second, that a valid rebuttable presumption can save an otherwise facially invalid ordinance from being declared unconstitutional.[619]

The presumptive validity of zoning ordinances was originally established by the Supreme Court of the United States in 1926, in *Euclid v. Ambler Realty Co.*.[620] In a case of first impression, the Court held that an ordinance may only be declared unconstitutional if its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[621] That decision included the finding that it is a permissible governmental objective to enact zoning ordinances that restrict land usage to single family

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marriage or legal adoption do not constitute the functional equivalent of a traditional family.

(3) In determining whether individuals are living together as the functional equivalent of a traditional family, the following criteria must be present: . . . [the code then lists four such criteria, (a), (b), (c), and (d)]

(e) Any other factor reasonably related to whether or not the group is the functional equivalent of a family.

Id.

616. N.Y. CONST. art. I, § 6, which provides: "No person shall be deprived of life, liberty or property without due process of law."

617. POUGHKEEPSIE, N.Y. CODE, § 19-2.2. This section provides in pertinent part: Family (2) "It shall be presumptive evidence that four (4) or more persons living in a single dwelling unit who are not related by blood, marriage or legal adoption do not constitute the functional equivalent of a traditional family."

618. ___ A.D.2d at ___, 607 N.Y.S.2d at 384.

619. *Id.*

620. 272 U.S. 365 (1926).

621. *Id.* at 395 (citing Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31 (1917)).

dwellings in order to maintain safe, quiet, low traffic neighborhoods.[622] This aspect of the holding is the prevailing rule of law in both state[623] and federal decisions.[624] Thus, subsequent due process challenges to zoning ordinances have, like the case at hand, focused primarily on whether the means employed by the municipality bears a substantial relation to the permissible objective.

Since the concept of "single family" residence has consistently been viewed as part and parcel of the permissible governmental objective,[625] it is not surprising that the definition of family has become the prime focus of attention. In *Baer v. Town of Brookhaven*,[626] the New York State Court of Appeals held that,

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622. *Id.* at 394 (stating that apartment houses can be characterized as approximating a nuisance when built in detached sections).

623. *See* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 305, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974) ("By requiring single family use of a house, the ordinance emphasizes and ensures the character of the neighborhood to promote the family environment . . . . Thus the city has a proper purpose in largely limiting the uses in a zone to single-family units."); Group House v. Board of Zoning and Appeals, 45 N.Y.2d 266, 271, 380 N.E.2d 207, 209, 408 N.Y.S.2d 377, 379 (1978) ("It is now settled law that a community may appropriately limit the use of certain neighborhoods to single-family residences."); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 549, 488 N.E.2d 1240, 1243, 498 N.Y.S.2d 128, 131 (1985) ("Indisputably, this ordinance was enacted to further several legitimate governmental purposes, including preservation of the character of traditional single-family neighborhoods, reduction of parking and traffic problems, control of population density and prevention of noise and disturbance.").

624. Moore v. East Cleveland, 431 U.S. 494, 499-500 (1977) ("The city seeks to justify [this single family dwelling unit ordinance] as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best."); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The town "restricted land use to one-family dwellings . . . ." *Id.* The Supreme Court held that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . ." *Id.* at 9.

625. *See, e.g.*, *Group House*, 45 N.Y.2d at 271, 380 N.E.2d at 209, 408 N.Y.S.2d at 379 ("It is now settled law that a community may appropriately limit the use of certain neighborhoods to single-family residences.").

626. 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989).

in order to pass due process review, a zoning ordinance may not impose numerical limits on households composed of unrelated individuals that are more restrictive than those imposed on households composed of related individuals.[627] It should be noted that this is a higher degree of protection against zoning restrictions than that afforded by federal decisional law. In *Village of Belle Terre v. Boraas*[628] the Supreme Court upheld an ordinance that placed no limitations on the size of households in which the people were related by "blood, adoption, or marriage," but which limited the number of unrelated individuals "living . . . as a single housekeeping unit" to two.[629]

In *Unification Theological Seminary* the plaintiffs did not challenge the city's purpose in enacting the zoning ordinance in question.[630] Rather, they sought to have the city code declared unconstitutional on the grounds that the means chosen by the city was not rationally related to that purpose.[631] They based their argument on the fact that the code clearly placed a greater

627. *Id.* at 943, 537 N.E.2d at 619, 540 N.Y.S.2d at 234.

> In McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 [(1985)] we addressed the constitutionality of a zoning ordinance which limited the number and age of unrelated persons who could dwell in a single-family home to two persons, 62 years of age or older. We held that the ordinance was invalid because it imposed a restriction on the number of unrelated persons residing together as a functionally equivalent family but imposed no such restriction on related persons. Such differentiation, we said, was not reasonably related to a legitimate zoning purpose and, therefore, violated the State Due Process Clause.

Id.

628. 416 U.S. 1 (1974).

629. *Id.* at 2. The issue was peripherally revisited in Moore v. East Cleveland, 431 U.S. 494 (1977) where the Supreme Court held an ordinance unconstitutional because it restricted the nature of related individuals who could comprise a single family. *Id.* at 518. Specifically, the ordinance prevented a grandmother from including in her household two grandchildren who were cousins and not brothers. *Id.* In reaching its decision the Court discussed case law in the various states, acknowledging that the states have tended to provide greater protection for the individual rights of homeowners. *Id.* at 518.

630. ___ A.D.2d at ___, 607 N.Y.S.2d at 384.

631. *Id.* at ___, 607 N.Y.S.2d at 384.

restriction on the number of unrelated persons who may reside together than on the number of related individuals who may reside together.[632] However, the appellate division held that the city code was not unconstitutional because the restriction[633] was in the form of a valid rebuttable presumption.[634] Thus, the fact that the city provided the plaintiffs with the opportunity to make a defense, according to factors specified in the code,[635] saved it from being held invalid.[636]

State and federal case law provide "that a rebuttable presumption involving the imposition of civil penalties . . . is valid if there is a rational connection between the facts proven and the facts presumed, and there is fair opportunity for the opposing party to make his defense."[637] This rule of law dates back to the seminal New York State case, *Board of Commissioners v. Merchant*,[638] wherein the court of appeals held that:

> so long as the legislature, in prescribing rules of evidence, . . . leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is

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632. *Id.* at ___, 607 N.Y.S.2d at 384.

633. POUGHKEEPSIE, N.Y. CODE §19-2.2 (2).

634. ___ A.D.2d at ___, 607 N.Y.S.2d at 384. ("A rebuttable presumption is valid if there is a rational connection between the facts needed to be proven and the fact presumed, and there is a fair opportunity for the opposing party to make his defense.").

635. POUGHKEEPSIE, N.Y. CODE §19-2.2, (3)(e).

636. ___ A.D.2d at ___, 607 N.Y.S.2d at 384.

637. Casse v. New York State Racing and Wagering Bd., 70 N.Y.2d 589, 595, 517 N.E.2d 1309, 1311, 523 N.Y.S.2d 423, 425 (1987); *see also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1975) (stating that as long as there is a rational connection between the presumption and the fact proved, the presumption does not constitute a due process violation); Sigety v. Leventhal, 42 N.Y.2d 953, 367 N.E.2d 644, 398 N.Y.S.2d 137 (1977) (upholding the presumptive evidence rule based on the rational connection between the presumption and the facts proved).

638. 103 N.Y. 143, 8 N.E. 484 (1886).

> difficult to perceive how its acts can be assailed upon constitutional grounds.[639]

In summary, both state and federal law apply a rational basis test when reviewing the constitutionality of a zoning ordinance. The rational basis test holds that such an ordinance is constitutional so long as it was enacted to pursue a legitimate governmental interest and there is a rational relationship between the interest pursued and the means selected for the purpose.[640] The state has determined that an ordinance will fail the rational relationship prong of the test if it is more restrictive with regard to unrelated individuals than it is with regard to related individuals.[641] Federal case law has held that restrictions on unrelated individuals in excess of those on related individuals can be upheld.[642] Thus, an ordinance that is upheld in the face of a New York State due process claim is unlikely to be struck down by a federal court, though the converse does not necessarily hold true. Finally, the constitutionality of the use of a rebuttable presumption to make an otherwise invalid ordinance valid, has, to date, only been dealt with under the state law, and only at the appellate level. On the other hand, under federal law, the city's

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639. *Id.* at 148, 8 N.E. at 485.

640. McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 549, 488 N.E.2d 1240, 1242, 498 N.Y.S.2d 128, 130-1 (1985). The court stated that:

> In order for a zoning ordinance to be a valid exercise of the police power it must survive a two-part test: (l) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'

Id. (citation omitted); *see also* City of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (holding that in order to be declared unconstitutional, an ordinance must be "arbitrary and unreasonable" and have "no substantial relation to [the police powers]".)

641. *See* Baer v. Town of Brookhaven, 73 N.Y.2d 942, 943, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989) (holding that an ordinance which "restricts the size of a functionally equivalent family but not the size of a traditional family" violated the state constitution).

642. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding an ordinance that did not limit the number of related individuals who could comprise a household, but did limit the number of unrelated individuals to two).

ordinance would probably have passed the rational basis test even if it had totally forbidden four or more unrelated persons from living together in a single family residence.[643]

THIRD DEPARTMENT

Hillard v. Coughlin III[644]
(decided February 3, 1993)

Petitioner, prison inmate, claimed that his state[645] and federal[646] constitutional rights to procedural due process were violated when Respondents denied his request to examine the videotapes and photographs reviewed by the Hearing Officer at his disciplinary proceeding.[647] The third department held that the denial of petitioner's request to reply to evidence used against him "implicated only the right to confrontation and cross examination"[648] since he was denied his regulatory right to reply to evidence against him.[649] The court further held that the evidence played a substantial role in the finding of guilt, and that the explanations as to why petitioner could not examine the evidence did not adequately enunciate "institutional safety and inmate privacy considerations."[650] Accordingly, the court granted petitioner a new hearing.[651]

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643. *Id.*

644. 187 A.D.2d 136, 593 N.Y.S.2d 573 (3d Dep't 1993).

645. N.Y. CONST. art. I, § 6.

646. U.S. CONST. amends. VI, XIV.

647. *Hillard*, 187 A.D. at 139, 593 N.Y.S.2d at 575.

648. *Id. at* 140, 593 N.Y.S.2d at 576.

649. *Id. See* N.Y. COMP. CODES R. & REGS. tit. VII, § 254.6(c) (1992). When an inmate is served with a misbehavior report a hearing is conducted, and N.Y.C.R.R. provides that "[t]he inmate . . . may reply orally to the charge and/or evidence and shall be allowed to submit relevant documentary evidence or written statements on his behalf." *Id.*

650. *Hillard*, 187 A.D.2d at 140, 593 N.Y.S.2d at 576 (quoting Bernier v. Mann, 166 A.D.2d 798, 799, 563 N.Y.S.2d 158, 159 (3d Dep't 1990)).

651. *Hillard*, 187 A.D.2d at 140, 593 N.Y.S.2d at 576.

Petitioner, an inmate at Southport Correctional Facility in Cheming County, was served with a misbehavior report.[652] The report resulted from petitioner's participation in the takeover of an outdoor exercise yard in the prison.[653] Specifically, the misbehavior report alleged violations of the Department of Correctional Services' rules on rioting[654] and leaving an assigned area without authorization.[655] At the disciplinary hearing, petitioner requested permission to view photographs and videotapes which were taken during the riot, however, his request was denied.[656] Subsequently, petitioner was found guilty on both charges.[657] In support of his finding, the Hearing Officer cited to the misbehavior report, the testimony of prison officials, and the videotapes in question.[658] Following unsuccessful administrative review, petitioner brought this C.P.L.R. article 78[659] proceeding to annul the determination on the grounds that his constitutional right to procedural due process had been violated because, inter alia, Respondent denied his request to examine the videotapes of the riot.[660]

The court held that petitioner's regulatory right to reply to the evidence was violated, reasoning that the videotapes played an

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652. *Id.* at 137, 593 N.Y.S.2d at 574.

653. *Id.*

654. *See* N.Y. COMP. CODES R. & REGS. tit. VII, § 270.2(B)(5)(i) (1989). Department of Correctional Services rule 104.10 provides in pertinent part that "[i]nmates shall not conspire or take any action which is intended to or results in the takeover of any area of the facility . . . ." *Id.*

655. *Hillard*, 187 A.D.2d at 140, 593 N.Y.S.2d at 576; *see* N.Y. COMP. CODES R. & REGS. tit. VII, § 270.2(B)(10)(ii) (1989). Department of Correctional Services rule 109.11 provides that "[i]nmates shall not leave an assigned area without authorization." *Id.*

656. *Hillard*, 187 A.D.2d at 137, 593 N.Y.S.2d at 574.

657. *Id.* at 138, 593 N.Y.S.2d at 574.

658. *Id.*

659. N.Y. CIV. PRAC. L. & R. art. 78 (McKinney 1991).

660. *Hillard*, 187 A.D.2d at 139, 593 N.Y.S.2d at 575. The court noted that there was substantial evidence in support of finding Petitioner guilty. *Id.* In addition, the court quickly dismissed Petitioner's arguments that the misbehavior report did not adequately describe the misconduct and that due process was denied by Respondent's failure to record a session. *Id.* at 138-39, 593 N.Y.S.2d at 575.

essential role in finding him guilty, and that the reasons for refusing his request to examine the evidence did not adequately articulate "institutional safety and inmate privacy considerations."[661] The court noted that although constitutional rights are diminished in the disciplinary hearing context,[662] inmates should be permitted to call witnesses and present evidence when institutional safety will not be unduly threatened.[663] If, however, disclosure of evidence is deemed to be hazardous to institutional safety or correctional goals, such evidence may remain confidential despite the Hearing Officer's reliance on it in rendering a decision.[664] Nevertheless, the court concluded that if documents are to remain confidential, the evidence must be "'submitted to the reviewing court for *in camera* inspection [and] the hearing officer must, at the time of the hearing, inform the inmate that he will consider certain information which will remain confidential and articulate some reason for keeping the information confidential.'"[665]

In *Hillard*, the court observed that Respondent had alerted petitioner to the fact that the videotapes would be considered and informed him that he could not view the tapes because "other inmates [were] there."[666] Nonetheless, if petitioner had been able to examine the videotapes, he could have identified himself on the tape and negated any adverse evidence used against him.[667] Hence, the court concluded that the videotapes played an

661. *Hillard*, 187 A.D.2d at 140, 593 N.Y.S.2d at 576 (quoting Bernier v. Mann, 166 A.D.2d 798, 799, 563 N.Y.S.2d 158, 159 (3d Dep't 1990)).

662. *Id.* at 139, 593 N.Y.S.2d at 575 (citing Wolff v. McDonnell, 418 U.S. 539, 560 (1974)).

663. *Hillard*, 187 A.D.2d at 139, 593 N.Y.S.2d at 575; *see also* Amato v. Ward, 41 N.Y.2d 469, 472-73, 362 N.E.2d 566, 569, 393 N.Y.S.2d 934, 936 (1977).

664. *Hillard*, 187 A.D.2d at 139, 593 N.Y.S.2d at 575.

665. *Id.* (quoting Boyd v. Coughlin, 105 A.D.2d 532, 533, 481 N.Y.S.2d 769, 770 (3d Dep't 1984). The *Hillard* court stated that "[c]oncerns for institutional safety may rationally be invoked to defend limitations on prisoners' constitutional rights . . . provided the request is reasonably related to legitimate security interests'" *Id.* (citations ommitted).

666. *Hillard*, 187 A.D.2d at 139, 593 N.Y.S.2d at 575.

667. *Id.* at 139-40, 593 N.Y.S.2d at 575-76.

important role in the Hearing Officer's finding that petitioner was guilty.[668] Moreover, the explanations as to why petitioner could not examine the evidence did not adequately articulate "institutional safety and privacy considerations."[669] Consequently, the Court held the petitioner had been denied his regulatory right to reply to the evidence against him and accordingly, granted petitioner a new hearing.[670]

Inmate procedural due process rights in the federal realm is delineated in *Wolff v. McDonnell.*[671] In *Wolff*, the Supreme Court addressed the issue of whether procedural due process right guarantees extend to inmates while participating in disciplinary

668. *Id.* at 140, 593 N.Y.S.2d at 576. *Compare* Boyd v. Coughlin 105 A.D.2d 532, 534, 481 N.Y.S.2d 769, 771 (3d Dep't 1984) (although Hearing Officer should have informed Petitioner of reasons for confidentiality error was harmless since documents were irrelevant).

669. *Id.* (quoting Bernier v. Mann, 166 A.D.2d 798, 799, 563 N.Y.S.2d 158, 159 (3d Dep't 1990)). *Compare* Pinargote v. Berry, 147 A.D.2d 746, 748, 537 N.Y.S.2d 339, 341 (3d Dep't 1989) (advising Petitioner that identification of informant would jeopardize his safety is an adequate explanation) *and* Odom v. Kelly, 152 A.D.2d 1010, 543 N.Y.S.2d 811, 812 (4th Dep't 1989) (Petitioner not entitled to information regarding informant's identity and testimony because confidentiality was necessary to protect inmate's safety).

670. *Hillard*, 187 A.D.2d at 140, 593 N.Y.S.2d at 576. The court declined to endorse expungement as an appropriate remedy. *Id*

Expungement is required only when (1) the challenged disciplinary determination is not supported by substantial evidence; (2) there has been a violation of one of the inmate's fundamental due process rights as enunciated in Wolff v. McDonnell, 418 U.S. 539 [(1974)] . . . ; or (3) other equitable consideration dictate expungement of the record rather than remittal for a new hearing. *Id.*

As to the first precondition, the court observed that the Hearing Officer's determination is supported by substantial evidence. *Id.* The second element is not satisfied because Petitioner's request to examine the videotapes involved the right to confrontation and cross-examination, which the Supreme Court expressly excluded from inmate due process rights. *Id.* As to the third prerequisite, the court concluded that equity does not require expungement. *Id.* Thus, the court ruled that a new hearing, and not expungement, is the appropriate remedy in this case. *Id. See also* Freeman v. Coughlin, III, 138 A.D.2d 824, 825-26, 525 N.Y.S.2d 744, 745 (3d Dep't 1988) (new hearing granted where Petitioner was not given an explanation for confidentiality).

671. 418 U.S. 539 (1974).

hearings.[672] The Court ultimately decided that inmate disciplinary hearings do not demand all of the procedural due process rights guaranteed in probation and parole revocation hearings. Specifically, inmates participating in inmate disciplinary hearings are not entitled to the right to confront or cross examine witnesses.[673] Nor are inmates guaranteed the right to counsel at such hearings.[674] According to the Supreme Court, allowing these procedures would disrupt the prison setting and cause resentment among prisoners.[675] The Court reasoned that special circumstances surround inmate disciplinary hearings, including the fact that these hearings "take place in a closed, tightly controlled environment" an that they "involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them."[676] Because prison officials closely supervise and control inmate activities, courts must give deference to prison officials' disciplinary decisions so as to promote inmate respect for prison officials.[677] Consequently, it was the culmination of these factors which weighed heavily in the Court's decision to deny extending the rights of confrontation and cross-examination to inmates in disciplinary hearings.

However, the Court did hold that certain minimum procedural requirements include at least twenty-four hour advance written notice of the hearing on the claimed violation, an opportunity to be heard, a conditional right to call witnesses and present evidence unless doing so would jeopardize prison security, or correctional goals, and a written statement detailing the evidence relied on and reasons for the disciplinary action.[678] In the event that a prison official refuses to allow an inmate to call a witness at a disciplinary hearing, they must provide an explanation, however, they may do so on the record during the hearing or in

672. *Id.* at 553.
673. *Id.* at 567-68.
674. *Id.* at 570.
675. *Id.* at 567-70.
676. *Id.* at 567-68.
677. *Id.*
678. *Id.* at 563-67.

court if the denial is subsequently challenged.[679] Furthermore, the explanations for denying permission to present witnesses must be logically related to institutional safety or correctional goals.[680]

In conclusion, New York law, in contrast to federal law,[681] provides an inmate with the procedural due process rights to confrontation and to cross-examination while participating in disciplinary proceedings.[682] Furthermore, in the event that such requests are denied, prison officials are required to articulate a rational basis for the denied requests.[683] While, the Supreme Court has articulated certain minimum procedural requirements, the right to confrontation and cross-examination as set forth in New York constitutional law, are absent as a matter of federal constitutional law.[684]

679. Ponte v. Real, 471 U.S. 491, 497 (1985). The Court noted that the additional administrative burden created by requiring contemporaneous reasons would "detract from the ability to perform the principal mission of the institution." *Id.* at 498.

680. *Id.* at 497.

681. Inmates' constitutional rights are implemented by the prison regulations in New York State. Laureano v. Kuhlmann, 75 N.Y.2d 141, 146, 550 N.E.2d 437, 443, 551 N.Y.S.2d 184, 190 (1990).

682. Hillard v. Coughlin, 187 A.D.2d 136, 140, 593 N.Y.S.2d 573, 576 (3d Dep't 1993).

683. *Id.*

684. Wolff v. McDonnell, 418 U.S. 539, 566-68 (1974).